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No. A-964

In the Supreme Court
of the United States

October Term, 1985

William Harold Kelley,
Petitioner,

-against-

The State of Florida,
Respondent.

On Petition for a Writ of Certiorari to the
Supreme Court of Florida

PETITIONER'S REPLY BRIEF

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I. RESPONDENT FAILS TO MEET PETITIONER'S ARGUMENT THAT THE FLORIDA SUPREME COURT'S "VARIABLE ANALYSIS TEST" IS CONSTITUTIONALLY DEFECTIVE

The government's Response in Opposition ignores the significance of Petitioner's challenge to the Florida Supreme Court's "variable analysis test." This case presents the critical issue whether it is constitutionally permissible to deny an otherwise meritorious claim that critical evidence was destroyed, merely because the reviewing court can find no evidence of governmental bad faith. This Court's decisions in Brady and Agurs would clearly prevent such a result; they hold that the government's conduct is irrelevant to the court's analysis of the impact of the missing evidence at the defendant's trial. Cf. Brady v. Maryland, 373 U.S. 83, 87 (1963); United States v. Agurs, 427 U.S. 97, 110 (1976). In this case, however, the Florida court grounded

its decision on the alleged absence of governmental bad faith, concluding that "if even the slightest hint of prosecutorial misconduct was present in the case the result might well be different." Respondent glibly asserts on one hand that the Florida decision is "consistent" with Brady and Agurs, and then attempts on the other hand to defend the decision's emphasis on good faith by "noting" that this court's recent decision in California v. Trombetta, 104 S.Ct. 2528 (1984), also contained a discussion of governmental good faith. Respondent does not -- indeed can not -- explain how a decision which turns on a finding of governmental good faith can be "consistent" with this Court's insistence that "the moral culpability of the prosecutor" should not contribute to the court's ultimate decision, much less determine it. Agurs, 427 U.S. at 110.

The Response in Opposition demonstrates the need for a clarifying decision from this Court. It reflects precisely the kind of confusion about the role of governmental good or bad faith in a destruction of evidence analysis which requires authoritative resolution. States such as Florida are using Trombetta's passing discussion of governmental good faith to change fundamentally the substance of destruction of evidence analyses, ignoring the limits set by this Court in Brady and Agurs. This case presents an appropriate vehicle to resolve the confusion. Indeed, the difference between a correct and an incorrect test in this case is also the difference between life and death for Petitioner.

The Response in Opposition also asserts that Petitioner's challenge to the Florida Supreme Court's "variable analysis test" is not properly before this court because

Petitioner's "contention that the Florida Court applied an unconstitutionally stringent test was never asserted by Petitioner nor passed upon by the Florida Supreme Court." Opposition at 10. This argument is specious. Obviously, Petitioner could not ask the Florida court to "pass upon" the constitutionality of its legal reasoning before the court had issued its decision relying on that reasoning. The Supreme Court of Florida's analysis, legal reasoning, and selection of precedent could not be anticipated in advance; there were no lower court opinions in this case addressing the constitutional aspects of Petitioner's due process claim. At every level, from a pre-trial motion to dismiss the indictment through his appeal to the Florida Supreme Court, Petitioner asserted that he was denied his constitutional right to due process and was

unable fully to defend himself because the government had intentionally destroyed critical exculpatory evidence. Thus, Petitioner's due process claim was fully preserved and is properly before this court.[1]

The Response in Opposition attempts to undermine Petitioner's demonstration of the materiality of the destroyed evidence by noting that it was the state's exhibits against John Sweet which were destroyed and by asserting that Petitioner could readily have substituted unspecified "lab results" for the critical missing evidence. Opposition at 14 - 16. These assertions are grossly misleading. True, the state's exhibits against Sweet were

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[1]The government's reliance on Cardinale v. Louisiana, 394 U.S. 437 (1969) (Opposition at 10) is misplaced. In that case, this Court dismissed its writ for want of jurisdiction where no federal question had ever been raised prior to the filing of the Petition for Certiorari. Here, of course, Petitioner's constitutional claim has been raised and preserved throughout.

destroyed, and "the defense exhibits were still available...." Opposition at 14. But the interests of Petitioner and Sweet are in conflict; not only was Sweet the star witness against Petitioner, but Petitioner contends that the actual murderer may well have been Sweet. Consequently, Sweet's "defense" exhibits cannot be expected to assist Petitioner's defense. The government's exhibits however, and in particular the real evidence relating to the murder scene, would be highly relevant to proving Petitioner's innocence. While the government never contended that Sweet was at the murder scene, it did contend that Petitioner was. Evidence -- such as fingerprints and bloodstained objects-- that was merely tangential at Sweet's trial would have been vital in assisting Petitioner to prove that he was not at the scene.

The government blithely contends that "lab reports pertaining to the sheets" and the medical examiner's testimony provided Petitioner with "comparable evidence" to replace the missing evidentiary items, including the sheet. Opposition at 16. The contention is erroneous. Petitioner insisted at trial that because "Kelley" was seen shortly after the murder with no blood on his clothes, he could not have committed this very bloody crime. The state countered this assertion -- as it now concedes -- by contending "that the sheet was wrapped around the victim before he was stabbed to absorb the blood." Opposition at 15. Thus, the cut and bloodstained sheet's absorption potential was a central factual issue for both the defense and the prosecution. Yet the "lab tests" referred to by Respondent, the only ones performed before the sheet's destruction, did

no more than identify the blood type found on the sheet; they were completely irrelevant to the central dispute about whether the sheet could have absorbed the blood. Similarly, the medical examiner's testimony, which established that the victim's heart continued to pump for several minutes after the stabbing intensifies rather than obviates the need for the sheet itself. Opposition at 16. Did the blood spurt through the sheet or didn't it? No tests were performed analyzing the size and direction of the slits or the quantity of blood found on the sheet. Had the sheet been preserved, expert analysis and testimony could have answered this critical factual question. Without the sheet, each side could only ask the jury to engage in conjecture. Because the sheet was thus of such critical evidentiary importance, its materiality to Petitioner's defense cannot be denied, nor was there any

"comparable evidence" available to Petitioner after its destruction.

The government concedes that Petitioner was an active suspect in the case at the time the evidence was destroyed. Opposition at 2. Yet they also admit that he was given no notice or opportunity to challenge the destruction of all of the real evidence relating to the murder scene. Had anyone stopped to consider what impact the proposed destruction would have on any eventual trial of Petitioner, the exculpatory potential of items such as the sheet would have been obvious. Respondent quotes this court's language in Trombetta that, for destroyed evidence to be constitutionally material it must "possess an exculpatory value that was apparent before the evidence was destroyed." 104 S.Ct. at 2534. That phrase must mean an obvious exculpatory potential, since the

actual exculpatory value can never be known for certain before the trial and will depend in large measure on who the defendant is and the defense theory of the case. For example, fingerprints from the scene of a crime often possess exculpatory potential value at the time they are lifted but their actual value depends on the facts of the case. Where, as here, a bloodstained, knife-cut sheet and other items constitute the only evidence relating to the murder scene, it should be obvious that such items have the potential to exculpate a suspect such as Petitioner, because they are both the best and the only means to recreate, through expert analysis, critical aspects of the crime. By destroying this evidence, the state effectively deprived Petitioner of his ability to demonstrate that he could not have been the murderer.

II. RESPONDENT MISCONSTRUES PETITONER'S ARGUMENT THAT THE ADMISSION OF AN ALLEGED PRIOR CONSISTENT STATEMENT DEPRIVED PETITIONER OF DUE PROCESS AND THE RIGHT TO CONFRONTATION.

Petitioner was deprived of due process and the right to confrontation by the admission into evidence of the testimony of Abe Namia. Petition for Writ of Certiorari at 42 - 49. Sweet's testimony was the only evidence linking Petitioner to Maxcy's death. At trial, "[d]efense counsel clearly established an inference of improper motive to fabricate through its extensive cross-examination of Sweet concerning the laundry list of crimes for which he had been given immunity in return for his testimony against Kelley." Opinion of Florida Supreme Court, Petition for Writ of Certiorari at A-7. Namia's testimony -- that in 1967 Sweet told Namia of his and Kelley's involvement in Maxcy's death -- was offered to rebut this "clearly established ... inference." Despite

Sweet's vigorous in-court protests that he never told Namia anything of the sort, Sweet's 1967 statement was admitted for the truth of the matter asserted: that Petitioner had killed Maxcy. Petitioner had no opportunity to confront the declarant, since Sweet denied making the statement.

In Opposition, Respondent asserts, "this claim that there must be a foundation by eliciting the declarant's testimony that he made prior consistent statements is unsupported by any authority." Opposition at 19. Respondent misunderstands Petitioner's claim. The admission of Namia's statement violated the plain terms of the statute, which requires that the declarant be "subject to cross-examination concerning the statement" and that the statement be "consistent with [the declarant's] testimony." Fla. Stat. §90.801 (West 1979). Here, the statement was

inconsistent with the declarant's in-court testimony and the declarant was not subject to cross-examination -- because Sweet testified that he never made the statement. Numerous decisions reflect the necessity for consistency and the opportunity to cross-examine. See, e.g., United States v. West, 670 F.2d 675, 687 (7th Cir.), cert. denied, 457 U.S. 1124 (1982); United States v. Quinto, 582 F.2d 224, 234 (2d Cir. 1978). See also D. Louisell & C. Mueller, Federal Evidence §419 (1980) ("Not only claims of lack of memory and refusals to answer, but also denials of having made prior statements can effectively thwart cross-examination") (discussing Fed. R. Evid. 801(d)(1)).[2] And the constitutional right to

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[2]Respondent argues that Namia's testimony was "substantially consistent" with Sweet's. Opposition at 21. Respondent overlooks the vital inconsistency in their testimony: whether Sweet told Namia what Namia said he did. It is this inconsistency that deprived Petitioner of an opportunity to confront.

confrontation has been repeatedly emphasized by this Court. E.g., Ohio v. Roberts, 448 U.S. 56 (1980); California v. Green, 399 U.S. 149 (1970).

III. RESPONDENT MISUNDERSTANDS PETITIONER'S ARGUMENT THAT THE IMPOSITION OF THE DEATH PENALTY IN THIS CASE IS UNCONSTITUTIONAL

Petitioner has asserted inter alia that the death penalty is imposed arbitrarily, on the basis of the victim's race. Petition for Writ of Certiorari at 50 - 53. The essence of this claim is currently before the Court. Hitchcock v. Wainwright, cert. granted, 106 S. Ct. 2888 (1986); McCleskey v. Kemp, cert. granted, 106 S.Ct. 3331 (1986). Although Respondent claims at one point that this issue was not properly preserved, Opposition at 24, Respondent concedes that Petitioner raised the issue "in his brief before the Florida Supreme Court." Opposition at 23. In fact, Petitioner presented this precise issue to the Florida Supreme Court and Respondent answered on the merits. Brief of Appellant, Part VI.B; Brief of Appellee, Part VI.G. Clearly, if there was no procedural bar to the Florida Supreme

Court's consideration of this issue, the issue was properly preserved, and there is no bar to this Court's consideration.

Petitioner has also argued that the imposition of the death penalty here is unconstitutional. Petition for Writ of Certiorari at 53 - 59. In this case, Florida's statutory scheme pyramided aggravating circumstances and thus enhanced the chance that the aggravating circumstances would outweigh mitigating circumstances. In addition, the statutory scheme permitted the sentencing judge to consider as an aggravating circumstance Petitioner's single prior felony conviction, despite the fact that the only thing known about this incident is that it occurred when Petitioner was sixteen years old and involved $114 and a six-pack of beer. Cf. Solem v. Helm, 463 U.S. 277, 296-97 (1983) (sentence of life imprisonment without

possibility of parole could not be supported by "relatively minor" felony convictions). Respondent's sole reply is that "Florida's aggravating circumstances have been repeatedly upheld by this Honorable Court." Opposition at 26. Respondent completely misses the thrust of Petitioner's challenge. Petitioner does not dispute the facial validity of the Florida statute but notes its unconstitutional application to the Petitioner in this case.

CONCLUSION

Petitioner who has vigorously asserted that he was not involved in the murder has been sentenced to death after the State deliberately and without notice to him destroyed crucial evidence that could have established his innocence. The State thus exploited the absence of the evidence at the trial and relied on inadmissible hearsay. The resulting conviction and death sentence of a defendant, whose only prior felony conviction was a juvenile offense involving a six-pack of beer, warrants review by this court.

For the above-stated reasons, as well as those set out in the Petition for a Writ of Certiorari, this Court should grant the Writ to decide the important questions of law raised here.

Respectfully submitted,

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